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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 232

THE UNITED STATES, *Petitioner*

v.

GEORGE J. SCHAEFFER and HERMAN ROBBINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on March 4, 1952, by the United States Court of Claims.

OPINIONS BELOW

The opinion of the Court of Claims overruling petitioner's demurrer (R. 4-6) is reported at 114 C. Cls. 568. The opinion of the Court of Claims supporting the final judgment (R. 15-17) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 4, 1952 (R. 17). On May 28, 1952, the Chief Justice extended the time within which the petition for a writ of certiorari might be filed to and including August 1, 1952. (R. 18). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether in the case of a requisition pursuant to Section 902 of the Merchant Marine Act of 1936, as amended (*infra*, pp. 2-4), the statute of limitations begins to run against the owner's claim for just compensation at the time of the requisition or after the administrative offer of just compensation and payment to the owner of 75% of the amount so offered.

2. Whether the administrative offer of just compensation or the payment, pursuant to Section 902, of 75% of that amount constitutes an acknowledgment or a part payment tolling the statute of limitations.

STATUTES INVOLVED

1. Section 902 of the Merchant Marine Act of 1936 (49 Stat. 2015), as amended by the Act of August 7, 1939, Section 3 (53 Stat. 1255, 46 U.S.C. 1242), reads in pertinent part:

> SEC. 902. (a) Whenever the President shall proclaim that the security of the national de-

fense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

* * * * * *

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).[1]

2. 28 U.S.C. 2501 reads in pertinent part:

§ 2501. *Time for filing suit.*

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

* * * * * *

3. Other pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 19-21.

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[1] Sections 41 and 250 of 28 U. S. C., 1934 edition, are now distributed in 28 U.S.C. 1346, 2401, 2402, and 28 U.S.C. 1491, 1496, 1501, 1503 and 2501, respectively.

STATEMENT

On August 11, 1942, the respondents were joint owners of a commuter-type yacht, the Panzola II. On that day, the War Shipping Administration, acting under the authority of Section 902 of the Merchant Marine Act of 1936, as amended (*supra*, pp. 2-4), requisitioned the Panzola II for the use of the Coast Guard.[2]

On May 15, 1943, the War Shipping Administration made the determination of just compensation required by Section 902(d) and offered to pay $7,000 for the Panzola II. Following the rejection of this offer on May 28, 1943, and after extended negotiations (R. 19-44), it was agreed on May 25, 1944 that the War Shipping Administration would pay $5,250, *i. e.*, 75% of $7,000, to respondents. Payment of the $5,250 was made on June 9, 1944 (R. 12).

On April 4, 1949, almost five years after the 75% payment, almost six years after the administrative offer, and more than six years after the Panzola II had been requisitioned, respondents filed this suit in the Court of Claims alleging that just compensation for the Panzola II amounted to $30,000. In view of the partial payment of $5,250, they asked for $24,750 plus interest (R. 12). The Government demurred on the ground that the suit had

[2] During the war period the functions of the Maritime Commission with respect to the requisition of vessels under Section 902 had been transferred to the War Shipping Administration. Executive Order No. 9054, Sec. 3, 7 F. R. 837.

been filed more than six years after the cause of action had first accrued and that the Court of Claims consequently lacked jurisdiction over the claim (28 U.S.C. 2501, *supra*, p. 4). (R. 4).

The Court of Claims overruled the demurrer on October 3, 1949. It construed Section 902(d) as providing for an administrative remedy which had to be exhausted before the owner of the requisitioned vessel had access to the courts. Consequently, it held that respondents' claim for just compensation did not accrue at the time of the taking and that the action, having been filed within six years following the War Shipping Administration's determination, was timely. The court added, as a suggested alternative ground for its decision, that the "part payment and the accompanying acknowledgment that at least the balance of the amount determined was still due might well be construed to toll the statute of limitations up to that time." (R. 4-6).

After trial, the court below held that at the time of the taking the Panzola II was worth $11,500, and on March 4, 1952, entered judgment against the United States for $6,250 plus interest (R. 15). The Government does not seek review of any questions other than those posed by the rejection of the defense that the statute of limitations barred this suit.

REASONS FOR GRANTING THE WRIT

This case presents the question of when the general six-year statute of limitations begins to run against the owner of a vessel which has been requisitioned pursuant to Section 902 of the Merchant Marine Act of 1936. By direct implication it raises the problem whether the owner has access to the courts immediately after the taking or whether his right to sue accrues only after an offer of just compensation.[3] These interdependent issues are of considerable general importance. Their resolution by the court below is contrary to the decision in *United States* v. *McNeil and Sons,* 267 U. S. 302, and inconsistent with the principles this Court has established in other cases. For these reasons, we submit, there is need for review by this Court.

1. At least twelve cases presenting the same issues and involving more than $40,000,000 are now pending in the Court of Claims. Moreover, the problem is by no means limited to these pending cases. Section 902 is still in effect,[4] and is operative today as a result of the President's Proclamation on December 16, 1950, of a national emergency.[5] Other statutes, including the Atomic En-

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[3] Cf. *Latvian State SS. Line* v. *United States,* 115 C. Cls. 811; *Estonian State SS. Line* v. *United States,* 115 C. Cls. 815. See p. 16, fn. 17, *infra.*

[4] In *United States* v. *Cors,* 337 U. S. 325, 328, this Court considered an interpretation of Section 902 to be of sufficient general importance to warrant certiorari.

[5] Proclamation No. 2914, 15 F. R. 9029, 3 CFR (1950 Supp.) 71.

ergy Act of 1946 (Section 13, 60 Stat. 772, 42 U.S.C. 1813), have similar requisitioning and compensation provisions.[6] It is plainly of vital interest, both to the Government and to persons who will in the future be subject to such requisitioning statutes, to know when the statute of limitations begins to run and when the judicial remedy may be pursued.

2. a. The holding below—that the general, clearly ample six-year statute of limitations on suits for just compensation may be extended unpredictably by negotiations for administrative settlement where takings are effected under Section 902 of the Merchant Marine Act—distorts the purpose of that Act and is inconsistent with decisions of this Court. It is settled that a claim for just compensation arises at the time of the taking [7] and that opportunities for administrative adjustment do not postpone the accrual of the cause of action.[8]

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[6] These provisions all go back to the emergency legislation of 1917, beginning with the Act of March 4, 1917 (39 Stat. 1192, 50 U. S. C. 82, *infra*, p. 19), which is still in effect in time of war.

[7] *United States* v. *Dickinson*, 331 U. S. 745; *Butler* v. *United States*, 23 C. Cls. 335, 339-340.

[8] *Clyde* v. *United States*, 13 Wall. 38; *Smithmeyer* v. *United States*, 147 U. S. 342, 357-358; *Howard University* v. *Cassell*, 126 F. 2d 6, 9-10 (C. A. D. C.); *Battelle* v. *United States*, 7 C. Cls. 297; *Southern Pacific Co.* v. *United States*, 67 C. Cls. 414, 422, certiorari denied, 280 U. S. 567; *Moriarty* v. *United States*, 97 C. Cls. 338, 340; *Tan* v. *United States*, 102 F. Supp. 552, 553 (C. Cls.).

Departing from these rules, the court below read Section 902(d) as establishing a special administrative compensation procedure which a claimant must exhaust, and concluded (R. 6) that "the right to sue * * * does not accrue until the terms of the statute are complied with." But this conclusion is flatly contrary to the decision of this Court in *United States* v. *McNeil and Sons,* 267 U. S. 302.

The *McNeil* case arose under Section 10 of the Lever Act of August 10, 1917 (40 Stat. 279, *infra,* pp. 20-21). That provision, in words substantially identical to those of Section 902 (see p. 4, *supra,* and pp. 20-21, *infra*), after authorizing the requisitioning of specified items, stated that the President "shall ascertain and pay a just compensation therefor" and that, if the person entitled to compensation was not satisfied with the President's determination, "such person shall be paid seventy-five per centum of the amount so determined * * *, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation * * *." Opposing the suit for just compensation, the United States argued that the district court had no jurisdiction because the plaintiff had failed to exhaust the procedure for administrative determination and partial payment set forth in Section 10. The district court overruled the demurrer, holding that the partial payment provision had been enacted solely for the

benefit of the owner of the requisitioned property and was not intended to interfere with or supersede the normal remedy for just compensation.[9] Reasserted on appeal (267 U. S. at 306), the contention that an administrative decision as to just compensation was a prerequisite to suit was rejected by this Court.

b. The contrary result reached by the court below, on statutory language which reproduces practically verbatim the provision considered in *McNeil*, distorts the purpose of Section 902 and similar statutes. Legislation of this kind was designed to alleviate the plight of property owners who, upon requisition of their property, would otherwise have to choose between (1) protracted litigation before receiving any compensation at all or (2) acceptance of a Government offer of compensation, with the risk that such acceptance would be considered a satisfaction of the entire unliquidated claim. See *United States* v. *Justice*, 14 Wall. 535, 548-549. Explaining the remedy to be afforded by Section 902, the House Report said (H. Rep. No. 660, 76th Cong., 1st Sess., p. 4):[10]

> It seems unfair and contrary to the precedents established during the World War to require a citizen who is dissatisfied with an award of

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[9] Transcript of Record, No. 444, Oct. T. 1924, p. 11.

[10] To the same effect, see S. Rep. No. 678, 76th Cong., 1st Sess., p. 4. See also 84 Cong. Rec. 10627.

> just compensation made by the Commission either to take what is offered or wait for all his compensation until his claim has been passed upon by the courts.

Similar explanations described the purpose of the predecessor statutes of 1917.[11]

Far from implementing this statutory objective, the decision below thwarts it in making the provision for administrative settlement, intended by Congress as a benefit, a new condition precedent to the traditional remedy of suit in the Court of Claims. In Section 902, as in the statute considered in *Smithmeyer* v. *United States,* 147 U. S. 342, Congress "did not repeal, either expressly or by implication, the general jurisdictional act of the Court of Claims * * *. The general jurisdiction of the Court of Claims and the additional method of adjustment can both of them well stand together." 147 U. S. at 357-358. By treating "the additional method of adjustment" created in Section 902 as a formal administrative proceeding, subject to judicial review only at its conclusion, rather than as the frequently lengthy course of negotiations which it is in fact, the decision below imposes a

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[11] See 54 Cong. Rec. 3140, 4740, 4968; 55 Cong. Rec. 2508, 3015. It was pointed out to Congress that the Court of Claims had a backlog of 4,000 cases which was likely to increase with the addition of requisition claims, and that equity required partial compensation of the owner while his claim was being litigated.

compulsory postponement upon claimants desiring to sue for compensation when their property is taken. While the result benefits the dilatory respondents in this case (whose suit was filed over six years after the taking and almost six years after the administrative offer of just compensation), its consequences of delaying other suits and rendering uncertain the period of limitations (*infra,* pp. 15-17) were never intended by Congress.[12]

It bears emphasis that the administrative action provided for by Section 902 is not the kind of quasi-judicial proceeding which is ordinarily required to be completed before court review is available. Indeed, the Court of Claims itself did not describe the determination of just compensation in terms of formal administrative proceedings, but in terms appropriate for informal negotiations—re-

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[12] In reiterating its holding in this case, the court below said (R. 6) that the right to sue for property requisitioned under Section 902 "does not accrue until the conditions laid down in the statute are complied with, *regardless of whether plaintiffs could or could not have, by ignoring the statute, pursued another remedy.*" (Italics added.) The meaning of the language we have italicized is uncertain. We assume, however, that it does not mean a right of action accrues only after the administrative determination when a claimant gives heed to the statute, while a claimant, "by ignoring the statute," would be free to pursue another remedy. Such a construction would be wholly baseless, particularly in view of the fact that Section 902(d) does not make the administrative determination contingent on whether a claimant "pursues" or "ignores" it.

ferring, for example, to the Administration's "offer", respondents' rejection of this offer, and the fact that the parties ultimately "entered into agreement" (R. 11). And the record shows beyond doubt that the actual course of dealings between the Administration and respondents, involving no more essentially than a series of offers and counter offers, lacked all characteristics of a formal administrative adjudication. Such bargaining activities result in no administrative "decision" of the kind courts are called upon to "review." Because they are negotiations rather than adjudications—involving no agency power to compel the production of evidence and none of the other apparatus for the formulation of an administrative judgment on a reviewable "record"—they may be, and frequently are, hampered by the failure of vessel owners to supply data useful for an informed judgment as to valuation. Where the final administrative offer is unsatisfactory to the claimant, the suit which follows is in no sense a "review," but an ordinary suit for just compensation in which the court on a *de novo* record makes the usual independent judgment on valuation or any other questions presented.

c. Where Congress has intended that the time to sue for just compensation should run from the date of an administrative determination, it has expressly said so and has expressly shortened the ordinary limitations period of six years. Thus, in

the Defense Production Act of 1950, in a requisitioning provision otherwise comparable to the one here (*i. e.*, providing for an administrative offer of compensation and payment of 75 percent if the offer is unsatisfactory),[13] Congress declared that a person entitled to compensation should "be entitled to recover from the United States, in an action brought in the Court of Claims or * * * in any district court * * * , *within three years after the date of the President's award,* an additional amount which, when added to the amount so paid to him, shall be just compensation". (Italics added.) This provision is clear, explicit, and certain. It shows, we believe, that in the absence of any comparable statutory language, the court below erred when it read into Section 902 of the Merchant Marine Act an indefinite and uncertain postponement of the time for suit and tolling of the statute of limitations.

d. While it is distinguishable, the decision in *McMahon* v. *United States,* 342 U. S. 25, strongly supports our view that the court below has erred. In that case, where the statute[14] provided that a claim, "*if administratively disallowed* in whole or

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[13] Act of September 8, 1950, Tit. II, § 201(a), 64 Stat. 799, 50 U.S.C. App., Supp. IV, 2081(a). The amendatory Acts of July 31, 1951, and June 30, 1952, made no presently material change in this provision.

[14] Clarification Act of March 24, 1943, § 1(a), 57 Stat. 45, 50 U.S.C. App. 1291(a).

in part" (italics added), could be enforced pursuant to the provisions of the Suits in Admiralty Act, this Court rejected the contention that the statute of limitations did not begin to run until administrative disallowance. There, as here, the provision for administrative action had been fitted into a pre-existing remedial scheme. There, as here, Congress had given "no indication of any change in the limitation contained in the older Act." 342 U. S. at 27.

By ignoring these identical considerations in the present case, the Court of Claims has replaced the definite and ample six-year limitation with an uncertain guide which leaves doubt as to when the right to sue accrues and when it terminates. For the obvious consequence of the decision below is that it renders the expiration of the statute of limitations dependent upon the varying degrees of delay in the administrative determination of just compensation.[15] In an effort to limit the resulting uncertainties, the court below has held that the statute of limitations does run against an owner who unjustifiably delays the administrative de-

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[15] Contrast *Southern Pacific Co.* v. *United States*, 67 C. Cls. 414, 422, certiorari denied, 280 U. S. 567: "The statute of limitations, intended as a wholesome protection of the Government, must not be permitted to depend upon any fluctuating or uncertain conditions that may arise from the delay occasioned by an investigation of disputed claims by executive officers. Plaintiff's theory, if sustained, would prove subversive of the purpose of the limitation fixed by the law."

termination of just compensation.[16] And, conversely, it has held that a long, unexplained delay by the administrative agency gives a claimant access to the courts even though the procedure for administrative settlement has not been exhausted.[17] But these exceptions—under which the right to sue may accrue and expire at some unknowable time despite the court's usual rule that there is no right prior to completion of the administrative determination—only highlight the fallacy of the decision in this case. They make it clear that the "practical ends which are to be served by any limitation of the time within which an action must be brought" have not been served here. *Reading Co.* v. *Koons*, 271 U. S. 58, 62. For, wholly apart from its failure to follow the rule of strict construction which applies to a limitation provision in a statute

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[16] *Dawnic SS. Corp.* v. *United States*, 90 C. Cls. 537, 578-579. This case was decided under the Act of June 15, 1917, *infra*, pp. 19-20, which was substantially the same, for present purposes, as the statute involved here and to which the Court of Claims has applied the rule announced in the instant case.

[17] *Latvian State SS. Line* v. *United States*, 115 C. Cls. 811; *Estonian State SS. Line* v. *United States*, 115 C. Cls. 815. In these cases, following the instant decision, in order to protect fully the interests of the Government, the defense was interposed that the suits were premature because no administrative determination had yet been made. While we deem it necessary to preserve such defenses pending review of the decision below, it is our position, of course, that this claim of prematurity should ultimately be held to be incorrect in every case.

waiving the Government's immunity,[18] the decision below departs from the general principle that such a provision must operate so "that there may be, at some definitely ascertainable period, an end to litigation." *Reading Co.* v. *Koons, supra,* at 65.

3. The court below suggested (R. 6), as a possible alternative ground for its decision, that the payment of $5,250 and acknowledgment that another $1,750 was due might have tolled the statute of limitations. But the suggestion is squarely contrary to this Court's decision in *United States* v. *Wilder,* 13 Wall. 254, which disposed of the notion that payment of less than the amount claimed, accompanied by denial of any right to the full amount claimed, could be considered an acknowledgment of indebtedness to the full extent of the claim.[19] It departs, moreover, from decisions of the Court of Claims itself, holding that the running of the statute of limitations is not tolled by payments following accrual of the right to sue[20] or by acknowledgments of the claim by government officials.[21]

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[18] *McMahon* v. *United States,* 342 U.S. 25, 27.

[19] Since the statute of limitations (28 U.S.C. 2501) bans suits in the Court of Claims unless filed "within six years after such claim *first* accrues" (italics added), it would seem that the doctrines of acknowledgement, new promise, and part payment have no application in any event.

[20] *Pink, Liquidator* v. *United States,* 85 C. Cls. 121, 124.

[21] *Central Pacific R. R. Co.* v. *United States,* 24 C. Cls. 145, 154; *L. E. Myers Co.* v. *United States,* 105 C. Cls. 459, 478.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1952.

In a more recent departure from its prior decisions, the Court of Claims has held that a settlement of a claim by the Comptroller General constituted a new promise "setting the Statute of Limitations running anew upon the newly created cause of action." *Marr* v. *United States,* C. Cls. No. 50015, decided July 15, 1952. There, as in the instant case, the court has apparently ignored the settled rule that Government officials lack power to waive or extend statutes of limitations. *Finn* v. *United States,* 123 U. S. 227, 233; *Munro* v. *United States,* 303 U. S. 36, 41.

APPENDIX

1. The Act of March 4, 1917 (39 Stat. 1168) provides in pertinent part (39 Stat. 1193, 50 U.S.C. 82):

> (d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

2. The Act of June 15, 1917, 40 Stat. 182, 183, provided in pertinent part:

> Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof,

or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

3. Section 10 of the Lever Act of August 10, 1917, 40 Stat. 276, 279, provided:

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person

shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: *Provided,* That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

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No. 232

IN THE

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October Term, 1952.

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v.

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Petition for a Writ of Certiorari to the United States Court of Claims.

BRIEF IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Claims overruling petitioner's demurrer (R. 4-6) is reported at 114 C. Cls. 568. The opinion of the Court of Claims supporting the final judgment (R. 15-17) has not yet been reported.

JURISDICTION.

The judgment of the Court of Claims was entered on March 4, 1952 (R. 17). On May 28, 1952, the Chief Justice extended the time within which the petition for a writ of certiorari might be filed to and including August 1, 1952. (R. 18). The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. 1255.

QUESTION PRESENTED.

Whether the plaintiffs whose vessel was requisitioned under Section 902 of the Merchant Marine Act of 1936, as amended, and who, in accordance with the procedure specified therein awaited an administrative determination of just compensation, and after rejecting said determination accepted a payment of 75 percent of the amount so determined and within six years of the date of said determination filed suit in the Court of Claims for the balance owing on account of just compensation are barred by the Statute of Limitations.

STATUTE INVOLVED.

46 U. S. C. § 1242(d) reads as follows:

> "In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor, in the manner provided for by sections 41 (20) and 250 of Title 28."

STATEMENT OF THE CASE.

The relevant factual data is given in the Petition (p. 5).

The statements in the Petition describing the decision of the Court of Claims below, 114 Ct. Cls. 568 (1949), are not correct. The petitioner asserts (p. 6) that the Court of Claims ". . . construed Section 902(d) as providing for an administrative remedy which *had to be exhausted* before the owner of the requisitioned vessel had access to the courts." (Italics supplied) The petitioner also states that the Court of Claims ". . . held that *respondents' claim for just compensation did not accrue at the time of the taking. . .*" (Italics supplied)

The Petitioner has misconstrued the decision of the Court of Claims and by so doing has created illusory issues.

The Court of Claims, in referring to portions of 46 USC 1242, held:

> "Congress by the terms of the act just quoted provided for the requisitioning of needed vessels. It provided a method of payment for such vessels. It is desirable that such procedure be followed. Certainly plaintiff should not be penalized for following it." (citing cases) (114 Ct. Cls. 568)

The Court of Claims, in referring to the part of the Statute (Section 1242(d) which provides:

> ". . . such person shall be paid 75 per centum of the amount so determined and *shall be entitled to sue the United States. . . .*"

made the following determination:

> "The quoted clause specifically confers the right to sue, and certainly that right does not accrue until the terms of the Statute are complied with."

The Court added that

> "This is an affirmative right conferred by the terms of the Statute itself".

and further, that this right existed

> ". . . regardless of whether the plaintiffs could or could not have, by ignoring the Statute, pursued another remedy." (114 Ct. Cls. at 571)

The issues raised by the Petitioner are not present in this case. The Petitioner, in effect, is attempting, through the medium of this proceeding, to get a declaratory judgment on all manner of Statute of Limitation problems involved in the requisitioning by the government of private property without regard to the wording of the specific statute involved.

SUMMARY OF ARGUMENT.

This case does not involve any substantial question of federal law calling for a decision by the Supreme Court.

The case is unique and raises no question of general importance. Contrary to the statement in the Petition there are no known pending cases which have the same issues as are involved in this case.

The decision of the court below is consistent with prior decisions of the Supreme Court.

There are no conflicting decisions of Courts of Appeals to be resolved.

The decision of the court below is consistent with its own prior decisions.

ARGUMENT.

I. The Case Does Not Raise Any Important Federal Question.

The sole issue in this case is whether a statute which provides that an owner "shall be entitled to sue the United States" means what it says.

The statutory language is clear. There is no ambiguity. The Congress provided an administrative procedure for settling just compensation claims arising from the requisitioning of vessels. As an inducement to owners to follow this procedure, it was provided that should the administrative determination be unsatisfactory, the owner shall be paid 75 per cent of the amount so determined and thereafter be entitled to sue for the balance owing. The statute provides:

> ". . . such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as added to said 75 per centum, will make up such amount as represents just compensation therefor . . . ." (Section 1242d, 46 U. S. C.)

The Court of Claims was unanimous in holding that the statute in fact conferred upon the owner of a vessel a right to sue for such further sum, which added to the 75% received would constitute just compensation and that therefore a suit filed within six years of the accrual of that right was timely.

The petitioner's contention is that the statute confers no right to sue. This would mean that any one who followed the prescribed administrative procedure would be penalized for doing so by having a shorter time within which to file suit. Under petitioner's theory, if the Government should delay a determination for six years, an owner who followed the statutory procedure would, upon receiving 75 per cent of the determined amount, not be able to sue for the balance at all.

Apparently recognizing that the issues upon which this case turns is not one requiring review by the Supreme Court, petitioner endeavors to raise other points for Supreme Court consideration. Referring to the instant case, petitioner states:

> "By direct implication it raises the problem whether the owner has access to the courts immediately after the taking . . . ." (page 7).

This issue is not explicitly or implicitly in the case. The respondents did not bring suit for just compensation immediately after the requisitioning of their vessel but followed the remedial statutory procedure specifically made available for such claims as theirs.

The rights of an owner of a vessel who does not avail himself of this statutory remedy is not in issue in this case.

II. The Case Is Unique and Not of General Importance.

The present case involves the principal sum of $6,250. The petitioner has endeavored to create the impression, however, that the case turns on issues of great importance and general applicability. Petitioner stated to the Court:

"At least twelve cases presenting the same issues and involving more than $40,000,000 are now pending in the Court of Claims." (Page 7).

There is nothing in the record to substantiate this statement. But even apart from that fact and looking outside the record, the statement is simply not true. Counsel for the petitioner has identified for counsel for the respondents the twelve cases referred to in the petition. Far from substantiating petitioner's statement of the general applicability of the present case, reference to these twelve cases establishes that the contrary is in fact true. Not one of these twelve cases turns on the issues involved in the instant case.

By far the bulk of the $40,000,000 figure referred to is involved in seven cases which arise out of the requisitioning of 35 Danish ships. In each of those cases, contracts of accord and satisfaction were entered into with the United States Government within six years of the date of requisition. More than six years after that date the United States Government refused to carry out those contracts. A decision by the Supreme Court in the instant case could in no way resolve any statute of limitations problem there may be in the Danish ship cases.

The other five cases referred to in the petition are distinguished in the footnote.[1]

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[1] The case of Franco Italian Packing Co. v. U. S., Ct. Cl. #50268 involves the commandeering of vessels by the U.S. Navy. The subject statute is not involved. There was no part payment. Plaintiff is proceeding by virtue of the enactment of a private bill. The Statute of Limitations is not in issue.

The cases of Stafford Ordnance Corp. v. U. S., Ct. Cl. #49992 and Ettlinger v. U. S., Ct. Cl. #49269 involve requisitioning of ordnance material by the War Production Board. The subject statute is not involved. There were no part payments. The defendant made a motion for summary judgment in the Ettlinger case based upon the Statute of Limitations. In its brief the defendant stated, " . . . even if we accept the principles stated in this decision (Schaeffer and Robbins v. U. S., 114 Ct. Cl. 568) we find that it is clearly inapplicable to the present case." Thus, the de-

Under the particluar circumstances of the instant case suit was filed within six years of an administrative determination and also within six years of the date on which the Respondent received part payment from the United States Government. In the opinion of the Court below the fact of part payment was regarded as an alternative basis for the holding. Supreme Court consideration of this case would therefore not necessarily result in a decision even on the narrow question of whether or not an owner has six years within which to file suit following an administrative determination of just compensation as provided for by Statute.

III. The Decision of the Court of Claims Is Consistent With Its Prior Decisions and With the Prior Decisions of This Court.

Despite the fact that both the Statute involved and the decisions of the Court of Claims are simple, clear and unambiguous, the Petitioner has sought to create non-existent issues, by drawing unwarranted inferences. Then assuming these inferences to be facts, the Petitioner contends that the decision of the Court of Claims is in conflict with its prior decisions and with the decisions of the Supreme

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fendant is in the incongruous position of contending in this Court that the Ettlinger case and this subject case have the same issues—while taking a directly opposite position in the Court of Claims.

Richfield Oil Corporation v. U. S., Ct. Cl. #50436, involves a suit under the Fifth Amendment of the Constitution and not under the subject Statute. Plaintiff alleges it entered into charter party agreements with the Maritime Commission as a result of "economic duress and coercion". Plaintiff seeks to recover the difference between what it received and just compensation guaranteed to it under the Fifth Amendment.

Anderson v. U. S., Ct. Cl. #48603 is a suit for just compensation. Claim was filed with the War Shipping Administration which made offers to the plaintiff. The plaintiff rejected the offers, but did not request or receive the 75% part payment permitted by the Statute. There is a question in this case as to whether the plaintiff had abandoned its statutory rights.

Court. In support of its position the Petitioner cites several cases. Not one of these cited cases has any bearing on the precise and narrow issue which is involved in this case.

For example, the decision in the case of *United States* v. *McNeil and Sons* (267 US 302) was cited by the Petitioner as being in conflict with this case. The McNeil case involved a claim for just compensation resulting from the requisitioning of coal by the government. Suit was instituted in the U. S. District Court on the basis of the Fifth Amendment and Section 10 of the Lever Act. A demurrer was filed by the government based on the ground that the claimant had not followed the Statutory procedure set forth in the Lever Act. The Court held:

> "Jurisdiction was invoked under the Lever Act. The claim is for something alleged to have been commandeered or requisitioned by the President as provided by Section 10 and this section confers jurisdiction without qualification upon district courts to hear and determine controversies directly resulting from such action".

The instant case is clearly distinguishable from the McNeil case because in the McNeil case the claimant did not follow the statutory procedures.

While the Petitioner concedes that the case of *McMahon* v. *United States* (342 US 25) is distinguishable (p. 14) from the case at issue, it contends that that case supports its position ". . . that the Court below has erred."

The McMahon case involved the Suits in Admiralty Act. That Statute provided that any suit thereunder "shall be brought within two years after the cause of action arises." The pertinent administrative regulations then in effect provided that if a claim was not allowed within 60 days after filing "it shall be presumed to be administratively disallowed and the claimant shall be entitled to enforce his claim." The claimant failed to file suit within the time prescribed by the Statute. In the McMahon case the Court said, at page 27

> "We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of an action against the United States."

Apart from the conceded distinguishable features of that case, the decision has no bearing whatsoever on the narrow issue in this case. In the instant case the situation is altogether different. The government, having requisitioned the vessel, could at any time have made a final unilateral administrative determination of the value of the vessel as of the date of requisitioning and thus set the Statute of Limitations running. Claims which are covered by the Suits in Admiralty Act could include some for which the government had no notice whatsoever. The decision in the McMahon case rested solely on the construction of the Suits in Admiralty Act which is not comparable to the Merchant Marine Act of 1936 either in its purpose or language.

The Court below suggested that the payment of 75% of the amount offered by the government and the accompanying acknowledgment that at least the balance of the amount offered was still due might well be construed to toll the Statute of Limitations up to that time. The Court cited the case of *United States* v. *Wilder* (80 US 254) as authority for its position. The Petitioner herein cites the same case as authority for a diametrically opposite position without commenting on this incongruity.

A reading of the Wilder case clearly establishes the position taken by the Court below. The principle as enunciated by the U. S. Supreme Court in 1871 is set forth at page 256 as follows:

> "The principle on which part payment takes the case out of the Statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due."

CONCLUSION.

The instant case raises no substantial federal question, does not involve an issue of broad applicability and is in harmony with other decisions of this Court and of the Court of Claims. The petition for certiorari should therefore be denied.

Respectfully submitted,

SOLOMON DIMOND
Attorney for Respondents

October 9, 1952.

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 232

THE UNITED STATES, PETITIONER

v.

GEORGE J. SCHAEFFER AND HERMAN ROBINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In their brief opposing certiorari (pp. 6-7), respondents dispute our assertion (Pet. 7) that at least twelve cases involving over $40,000,000 present the issues arising in the instant case. Pointing out that government counsel has supplied them with the list of twelve cases on which our statement was based, respondents declare flatly (Br. in Opp. 6) that "Not one of these twelve cases turns on the issues involved in the instant case." As to all except one of the cases in question, respondents are mistaken. Eleven of the cases, presenting claims

totalling over $40,000,000, support our statement. As to the twelfth, involving a relatively trivial sum, our statement was incorrect. While this error is profoundly to be regretted, we believe that it does not affect the importance of this case or the need for review by this Court.

1. As respondents point out (Br. in Opp. 6), most of the $40,000,000 mentioned in our petition is claimed in seven cases arising out of the requisitioning of 35 Danish ships in 1941.[1] Contrary to respondents' assertion (*ibid.*), each of these cases involves a claim for just compensation, each was brought more than six years after the requisitioning date,[2] and each would be controlled by a decision of the limitations problem posed in the instant case.[3] It is true that the plaintiffs in those cases, *as alternative claims,* plead contracts with the Government for payment for the ships and seek recovery on the contracts. (These contract claims are for a total of about $3,200,000, whereas the just compensation sought totals over $39,000,000 and, if the interest claim is added, exceeds $40,000,000). It is clear, however, that in the claim for just compensation these cases squarely present the

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[1] C. Cls. Nos. 50446, 50447, 50448, 50463, 50464, 50465, and 50466.

[2] The suits were instituted in December of 1951.

[3] The requisitions in these cases were made under the Act of June 6, 1941, 55 Stat. 242, 50 U.S.C. App. 1271-1275, Section 1 of which (50 U.S.C. App. 1271) provides that just compensation shall be paid in accordance with Section 902 of the Merchant Marine Act of 1936, the statute involved in the instant case.

question the Government seeks to have reviewed here.

Ettlinger v. *United States,* C. Cls. No. 49269, is an eighth case which would be disposed of if the Government's views in the instant case were to prevail. The requisition in that case was made under the Act of October 16, 1941 (55 Stat. 742, 50 U.S.C. App. (1940 ed., Supp. IV) 721) which, like the statute here, provides for an administrative settlement and partial payment in the event of disagreement. There, as here, the suit was filed more than six years after the taking and there is a question whether the intervening efforts to reach a mutually satisfactory administrative determination tolled the statute of limitations.

Vividly demonstrating that the issues on which we seek review directly affect *Ettlinger* is the fact that counsel in that case was permitted by the Court of Claims to file a brief as *amicus curiae* in the instant case. The Government believes, as respondents point out (Br. in Opp. 6, n. 1), that the plaintiff in *Ettlinger* may fail even if the decision below in the instant case is followed there. This does not alter the fact that our position here, if sustained will control in that case.

A ninth case, *Stafford Ordnance Corp.* v. *United States,* C. Cls. No. 49992, is the same, for present purposes, as *Ettlinger* and is likewise directly affected by the decision in the instant case.

Anderson v. *United States,* C. Cls. No. 48603, arising under the statute involved in the instant case, repeats the pattern of (1) requisition, (2) a

suit more than six years later, and (3) administrative action during the interim period to determine just compensation. Respondents again mistakenly reason that a possible additional basis for decision eliminates in advance the plainly presented issue which is of concern here (Br. in Opp. 6, n. 1).

A similar mistake explains respondents' denial that the issue here arises in *Richfield Oil Corp.* v. *United States,* C. Cls. No. 50436. There, too, the plaintiff sues for just compensation more than six years after the taking. At the same time, that plaintiff, in another suit, in a federal district court, is seeking to have set aside a contract with the Government fixing its compensation. . It seems clear that, unless the statute is tolled pending the claimant's effective rejection of the compensation administratively determined to be proper, the Court of Claims suit must fail for substantially the reason urged by the Government in this case.

2. It must be conceded, however, that respondents are correct in stating that the twelfth case to which our petition had reference, *Franco-Italian Packing Co.* v. *United States,* C. Cls. No. 50268, where the claimant seeks $67,025.20, does not present the issue involved here. There, though the suit was brought more than six years after the taking, the private law authorizing the action (Priv. Law No. 808, 81st Cong., 2d Sess.) expressly waived the statute of limitations. We very much regret the error. The fact remains that the eleven remaining cases in the list given to respondents involve well over the $40,000,000 figure named in

our petition; this, plus the continuing importance for the future of the issue presented, is in our view sufficient to justify review by this Court.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.

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